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SENATE..... .....No. 69.

REPORT

ON EXPEDIENCY OF

ABOLISHING CAPITAL PUNISHMENT.

Commonwealth of Massachusetts.

In Senate, Feb. 11, 1837.

Ordered, That Messrs. Hudson, French and Ward, be a Committee to consider the expediency of Abolishing the Punishment of Death in this Commonwealth.

Attest,

CHARLES CALHOUN, *Clerk.*

from 55.5.75
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Feb. 10, 1877.

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Commonwealth of Massachusetts.

In Senate, March 7, 1837.

The Special Committee of this Board, to whom was committed an Order of February 11th, instructing them to "consider the expediency of Abolishing the Punishment of Death in this Commonwealth," have considered the subject, and submit the following

REPORT:

The subject referred to your Committee is confessedly one of the greatest importance. It involves the safety and happiness of society, and is a question of life and death to some members who compose it. The subject is also entitled to grave consideration, from the fact that it has for several years successively, been before the Legislature. Not only in Massachusetts, but in several of our sister States, are efforts making to change this part of the criminal law of our country. Your Committee are aware that some men, distinguished for their piety and philanthropy, are actively engaged in this cause; and with them the entire abolition of capital punishment is a "consummation devoutly to be wished." Your Committee have no disposition to question the sincerity of those who contend for the abolition of capital punishment; but at the

same time, they think that this benevolence or humanity is misplaced. The subject is confessedly important, and one which is not to be decided by feeling. The infliction of capital, or in fact, of any other punishment, naturally excites sympathy. But that sympathy is misplaced which enlists itself entirely on the side of the offender, to the neglect of those who are the victims of his outrages. We always respect the kind feelings and benevolent sensibilities of the heart; but these amiable qualities have but little to do with the question before us.

Every good man must lament the necessity, which requires an abridgment of the liberty of another. But when we consider that the unrestrained indulgence of one vicious man, would greatly impair the peace of society, and destroy the rights of thousands, the enlightened philanthropist acquiesces in the necessity which requires that the vicious man should be put under restraint. True wisdom and enlightened benevolence both require the intervention of human laws. It is weakness and not humanity which would permit the wicked to go unpunished. When benevolence is guided by wisdom, and is the result of enlarged views—when it arises from a full consideration of a subject, in all its bearings upon society, and the different members who compose it,—it is a virtue of sterling worth;—but when it is the result of mere good nature, and is unrestrained by wisdom—when it is exercised indiscriminately towards the virtuous and the vicious, it becomes a sort of animal sympathy, which hardly merits the name of a virtue.

We feel called upon to make these remarks, because the advocates for the abolition of the punishment of death profess to be in advance of the age in benevolence and humanity. We have before said that this subject is not

to be decided by feeling. But so far as benevolence and humanity are concerned, we believe that they are in favor rather than against capital punishments. We believe that the enlightened philanthropist will extend his sympathy to the virtuous rather than to the vicious—to the innocent victim rather than to the hardened murderer. Will those who boast of their benevolence and humanity look with cold-hearted apathy upon the sleeping family perishing in the conflagration of their dwelling, and still melt in tenderness towards the midnight incendiary? Will they shut up the bowels of their pity towards the innocent female despoiled of that jewel which makes life desirable, and reserve all their sympathy for her unprincipled destroyer? Unless they are willing to answer these questions in the affirmative, let us hear no more of their regard for human suffering, as connected with this subject.

The first question which presents itself in the investigation of this subject, is, whether human government has a *right* in any case to take human life. Some of the opponents of capital punishment deny to human governments this right. This doctrine has been put forth in documents which have been printed and re-printed for the use of the Legislature. We are sometimes told, that as human life is the gift of God, human governments have no right to take it away. But this reasoning goes against imprisonment as much as it does against capital punishment. A man's freedom is as much the gift of God as his life; and if human life cannot be rightfully taken in any case, because it is the gift of God, neither can human liberty be taken, and for the same reason. Those who oppose capital punishment on this ground, must, to be consistent, oppose our whole penitentiary system. They must go the entire length of this doctrine,

or admit the doctrine to be unsound. On what ground, we demand, can a man be deprived of his liberty—that richest boon of heaven? Is not this as valuable as life? Are we not frequently told by those who call themselves philanthropists, that they will not cease their efforts—that they have an inalienable right to proclaim and spread their views—that freedom is a sacred trust, dearer than life—and that they will offer themselves martyrs at the shrine of freedom, rather than surrender the liberty which God has granted them? And what is this, but saying that liberty is as much the gift of heaven as life, and that human government has no more right to abridge the one than to destroy the other? This doctrine is in fact as hostile to imprisonment, as it is to the punishment of death; it denies to society the right of restraining a man in any case whatever. Let us then hear no more of the boasted argument, that society has no right to take away what it cannot give; until those who employ it, are willing to allow that society has no right to confine a man within the walls of a prison.

We are sometimes told that "the command 'thou shalt not kill,' applies to individual men as members of an association quite as peremptorily as in their private capacity." We have no disposition to controvert this position; but we have yet to learn that it furnishes any argument against the infliction of capital punishment. What is the meaning of the command in question? Evidently this. Thou shalt not with malice aforethought destroy life. In this sense it was understood by the Saviour, who, in citing this passage, gave it in the following language; "thou shalt do no *murder*."* We readily allow that society has no more right to murder than individuals have. But who will pretend that earthly governments,

* Matt. 19: 18.

in cases of capital punishment, are actuated by malice aforethought? Surely not those who pretend to be in advance of the age in every thing benevolent and charitable.

The command before us is virtually a command to preserve life. "Thou shalt not kill," that is, thou shalt not with malice destroy human life, but shalt labor to preserve it. This applies to individuals as well as to society, and is to be interpreted in the same manner with reference to both. If the ruffian breaks into the dwelling of a peaceable citizen, for the purpose of destroying the lives of the whole family, and the master of the castle lays him low, he does not kill in the sense of the command—he does not maliciously take life; but in the true spirit of the gospel, he preserves it. By destroying the life of the invader, he preserves the lives of himself and family. The same principle will hold good with reference to society. By taking the life of a murderer, or of a person guilty of those crimes made capital by our statutes, the lives of others are preserved. By making a public example of one offender, many may be deterred from the commission of the crimes of murder or manslaughter. We can say then, in the language before quoted, "The command, 'thou shalt not kill,' applies to individual men, as members of an association, quite as peremptorily as in their private capacity;"—but we confess that we have not discernment enough to see how this militates against the punishment of death.

Nearly connected with the above is another position, taken by the abettors of the abolition of capital punishment. They say, that man in entering into the social compact, could not have given society the right to take his life, because he has no right over his own life. He has

no right to commit suicide, and, consequently, cannot impart this right to society. Although this position is put forth with confidence, we are persuaded that it will not bear the test of examination. We readily allow that no man has a right to destroy his own life, or to sport with it wantonly—he has no right to commit suicide. But we have yet to learn that man has no right to sacrifice his life in a good cause. Has not the patriot a right to sacrifice his life in defence of the dearest rights of his country? Has not the husband and father a right to put his own life in jeopardy to protect the lives of his wife and children? May not the philanthropist offer himself a victim to disease and death, to administer to the wants of his fellow beings? And is not the Christian expressly commanded to meet death rather than deny his Master? Shall we be told by those who profess to be patriots, and philanthropists, and Christians, that all who have lost their lives in the cause of their country, of humanity, and of religion, are guilty of self-murder? We think that they will be unwilling to impute to Warren, to Howard, and to the apostles, the odious crime of suicide.

It follows then, that men, though they have no right to destroy their own lives wantonly, have a right to give up their lives to the great cause of virtue and religion. They have a right and it is their duty to offer themselves a living sacrifice, rather than desert the greatest good of the community. Whenever it becomes apparent that the death of an individual would be more productive of human happiness than his life, that individual has a right to offer himself as a sacrifice on the altar of public good; and instead of his being guilty of the crime of suicide, he shows himself actuated by the highest and holiest principles in so doing. Admit then, that society possesses no greater

power on this subject than individuals, and what follows? Not that society has no right to take life, but that it has no right to take life unnecessarily and wantonly. No advocate for capital punishment maintains that human life ought to be taken for light and trivial causes. They allow that this punishment is not a suitable penalty to be affixed to every offence. It is to be resorted to only in cases of great criminality, and where the omission of this punishment would produce a greater evil than its infliction. We readily allow that no man has a moral right to commit suicide; and for this obvious reason;—life is a sacred trust, and is not to be squandered away. In no case has a man a moral right to destroy his life wantonly, or to permit others to do it, if it is in his power to prevent it. He is bound to preserve his own life, and the lives of others. This plain principle holds good with reference to society. Society has no right to commit suicide, or to allow others to disturb its peace and well being. It is bound by the highest moral principle to preserve its own existence, and to guard the lives of its members. It would be wanting in duty, if it permitted human life to be destroyed. As the individual would be guilty of suicide, who should sit still and permit another to take his life, when by proper exertion he could have prevented it; so society would be guilty of the blackest crime, if it permitted all order, and peace, and happiness to be destroyed, when by suitable laws and penalties, it could have prevented it. Society is under the most solemn obligation to preserve human life; and if the infliction of capital punishment will, on the whole, preserve the lives of its members, and render the community more happy, it is the duty of society to inflict it. They would be re-

miss in their duty—they would be criminal, if they should neglect it.

But we are told *that the whole object of government is negative,—that they are to preserve life, liberty and property, and not to destroy them.* Your Committee are perfectly willing to subscribe to the doctrine that governments are instituted to preserve life, liberty and property; but they are unable to perceive how this militates against the punishment of death. Government is bound to preserve the life, liberty and property of each of its subjects. But how shall this be done? By what means shall this desirable end be accomplished? If government is required to do this, it must possess all power requisite to its accomplishment. Government is bound to protect the *property* of its subjects; and how does it do it? It does it by good and wholesome laws—laws enforced by the penalty of fine or imprisonment. The government, by virtue of its obligation to protect all its subjects in the possession of their property, imposes a fine upon an individual who puts the property of others in jeopardy; and it does this on the ground that public good requires it—that it is better that the invader of the rights of others should lose a portion of his property, than that the property of the whole community should be unsafe. This principle is recognized by every government, and is cheerfully acquiesced in by every good citizen.

The same principle applies to the *liberty* of the subject. Government is bound to protect every citizen in its liberty; and yet in the discharge of this duty it commits a man to prison, and it does it on the principle that it is better to restrain the liberty of the villain, than that he should be allowed to invade the rights of others. The rights of no individual are to be invaded. While he de-

means himself peaceably, the government itself has no right to take his property, or to abridge his liberty. But when he wages war upon society, and attempts to rob others of their rights,—when he throws off restraint, and lays felonious hands upon the persons and property of his fellow citizens, it becomes the duty of the government to deprive him of his property by fine, or his liberty by imprisonment. This principle is so obviously just and reasonable, that every government on earth adopts it, and every virtuous citizen approves of its exercise. No man, of any standing in society, would hazard his reputation by condemning this exercise of power. No man, in his sober senses, will say that government has no right to fine and imprison for just cause. Though government is designed to protect men in their liberty and property, all must allow, that they have the moral right to restrain the villain, and to take from him his property or his liberty.

This principle applies to the *lives* of the citizens, no less than to their liberty and property. Government is bound to protect human life; and, on this very principle it inflicts capital punishment. It sets so high a value upon human life, and whatever tends to preserve it, that it will take the life of the wretch who destroys it, or puts it in imminent danger. The fact that government is instituted to protect its citizens in the enjoyment of life, liberty, and property, proves that they have the right, nay, that it is their duty, to take all necessary measures to preserve them unimpaired. They have from the very nature of the case, the same abstract right to take life by execution, that they have to take property by fines, or liberty by imprisonment. Let the opponents of capital punishment then, cease to urge this, their favourite argument, unless they are prepared to deny to government the right to fine and imprison.

But perhaps we shall be told that taking life does not protect society, or guard the lives of others any more effectually than some other punishment would. This objection shall be attended to in its proper place; but this is not its proper place. We are not at this time speaking of the expediency but of the right of capital punishment. And we must say, that we are unable to see how any man can deny the right to take life, any more than he can deny the right to fine or imprison. Government has no right to do either, without a sufficient cause. But if an individual wages war upon society, and endangers its peace and well being,—if he with wicked hands invades the peaceful dwelling, and, with malice aforethought, stabs his fellow to the heart, government has the right to protect itself, though it may deprive him of his property, his liberty, or his life.

It has been said, by the opposers of capital punishment, *that government is a necessary evil.* Your committee are hardly able to see the bearing which this position has upon the subject under consideration; for if government is *necessary*, every thing essential to the existence of government, must be necessary; and, on this ground, capital punishment can easily de defended. But we think that such representations of government are calculated to mislead. Man is a social being. He is designed by Heaven to dwell in society, and to take part in the pleasures and pains of his fellow creatures. Solitude is contrary to his nature, and adverse to his interest. Society is man's native element—the proper field for social, intellectual, and moral culture. His faculties could never be fully developed, his best affections improved, nor his soul exalted in solitude. Every affection, and every faculty allies him to his race, and marks him as a social being. This social

nature which bears the impress of the Deity, proves, that it is not good for man to be alone. But society implies government and laws. Man could no more live in society without government, than he could live without the atmosphere which encircles him. Nor is government to be regarded as an evil. Take man as he is, and government is the greatest blessing he can enjoy. It is essential to his improvement—to his happiness—to his being. Man was designed by Heaven to be under the influence of laws; and hence, it is said on divine authority, that "the powers that be, are ordained of God."

Now if society be man's native element, and government be essential to his well being, it follows that government must possess all power requisite to its own preservation; and to accomplish the great end for which it was instituted, it must inflict such punishments as may be necessary to guard, in the most effectual manner, the property, the persons, the lives of its subjects. Deprive government of this right, and you impair its worth, and defeat the great end for which society was instituted. Thus every view which we can take of the nature of man, or the character or design of government, leads us irresistibly to the conclusion, that society has a right to take human life, whenever the occasion requires it.

Your Committee are of the opinion, that this question can be decided satisfactorily by the condition of man, and the nature of society, without recourse to the scriptures. But as the scriptures are frequently appealed to, both by the friends and the opponents of capital punishment, we think it proper to take a brief view of those texts which have been thought to relate to this subject. We believe that a good argument can be drawn from the scripture in favor of the right of capital punishment, but

we are not satisfied with the reasoning generally employed on this subject. Some who contend for capital punishment, maintain that there is a plain, positive law requiring its infliction; "whoso sheddeth man's blood by man shall his blood be shed." This declaration which was made to Noah, is understood to be a law of universal application, and of binding authority; and as it existed before the Mosaic law, so it continues to the present day, not being abrogated with the rest of that code.—This reasoning may be satisfactory to some minds; but in our estimation it is far from being conclusive. This passage may be interpreted, as a prediction, or a declaration of what would be likely to ensue, in case a murder was committed. The passage will bear this exposition, as naturally perhaps, as the exposition which makes it an express law. Cotemporaneous construction, that important rule of interpretation, favors the former exposition. We think that the friends of capital punishment injure their cause by placing too much reliance upon this isolated text. To our minds an argument drawn from the general scope and spirit of an instrument, is of much more importance than one drawn from one single clause.

On the other hand, it is alleged that the law of Moses which made a great variety of crimes capital, is annulled; and from this fact it is inferred that we have divine authority for the abolition of capital punishment. This reasoning appears to your Committee to be entirely sophistical. They allow that the law was superseded by the gospel. But what was that law, and in what sense was it superseded? The institution of Moses was a threefold institution. It consisted of a *moral*, a *ceremonial*, and a *civil* code. This distinction is esssential to a right understanding of the subject before us. Now in what

sense was the law annulled by the gospel? Was the moral or spiritual part of that institution abrogated? Surely not. Instead of annulling the moral law, the Saviour took it into his special keeping, and carried its principle out to greater perfection. No person will contend for a moment, that the moral law is done away by the Christian dispensation. The ceremonial part of the law was annulled by the gospel. But how was it with the civil or criminal part of that institution? Was that entirely abrogated? Are all civil or political institutions done away by the New Testament? Will any man in his sober senses pretend that the gospel nullifies all law, and does away all governments? Such must be the fact, according to the argument now under consideration. The opposers of capital punishment contend that that penalty ought not to be affixed to any law in this age, because the law of Moses which inflicted the punishment of death, is done away. This reasoning would overthrow all civil institutions, would prostrate all government, and introduce a state of perfect anarchy. The argument employed against the punishment of death, applies equally against every other penalty. The law of Moses imposes fines in a great variety of cases, and will any sober man maintain that our government has no right to punish by fines, because the law of Moses is annulled?

The fact is, the civil law was never annulled by the gospel in the sense that some contend. Under the Mosaic economy church and state, so to speak, were united. There the civil and the religious were made one. The gospel dissevered them, but destroyed neither. It took the moral or religious part into its special keeping, and delivered the civil over to the nations of the earth, to be moulded and fashioned according to their wisdom. In

this sense and in this sense only, was the dispensation of the Hebrew law-giver annulled. Christ did not do away every thing pertaining to that ancient dispensation. He says himself, that "he came not to destroy the law, but to fulfil it." He repealed or abrogated the ritual or ceremonial part of the law, he took the moral or religious part under his care, and delivered the civil or political over to the nations. This, according to our opinion, is the true state of the case. No other view in our apprehension, will harmonize the scripture, and make the sacred volume consistent with itself. No other view will leave us a moral code, or a civil government; both of which are expressly recognized, and even required by the gospel.

From the view of this subject taken by your Committee, it will be seen that the abrogation of the legal dispensation furnishes no argument against capital punishment. The opposers of the punishment of death, apparently for the purpose of bringing that penalty into disrepute, frequently assert that the law of Moses is a system of revenge and retaliation. Your Committee are not disposed to enter into a theological discussion upon the merits of the legal dispensation; but they are satisfied that this representation is not correct. Instead of its being a system of revenge and retaliation, it is a system of kindness, extending its guardian care to the widow, the fatherless, the poor, and the stranger. The penalties were severe in some cases, but they were well adapted to that age of the world, and were calculated to guard the weak and defenceless.

Those who represent the law as a system of revenge, maintain that the gospel is so mild and benevolent, that capital punishment cannot be inflicted without violating

its provisions. We are commanded by the divine teacher, say they, not to resist evil ;—and from this it is inferred that capital punishment is contrary to the spirit of the New Testament. We readily allow that the gospel is a merciful system, and that it prohibits every thing like revenge. But we have yet to learn that this prohibition conflicts with the infliction of just and reasonable penalties. No man will interpret this prohibition in such a manner as to deny to government the right of passing laws, and affixing to them suitable penalties ; and if it is admitted that government has a right to enact such laws, as they may think the public good requires, then it follows that they may enact a law making those crimes capital, which are thought to merit that punishment.

Having expressed their views upon the arguments drawn from the scriptures on both sides of this question, your Committee will now state the argument which they themselves draw from that source. They find divine authority in favor of capital punishment. Under the legal dispensation life was taken for various crimes. Here, we have the sanction of the Judge of all the earth, who doeth right. But in the case of Cain, who murdered his brother, capital punishment was dispensed with by divine direction. We then have precedents both in favor and against capital punishment ; and the inference we would draw from this fact is, that under some circumstances the punishment of death should be inflicted, and under other circumstances should be dispensed with. Here then we have authority for capital punishment, when the state of society renders it necessary. When the new dispensation was introduced, the theocracy was brought to an end ; the civil department of that institution was delivered over to the nations. And how are the nations to gov-

ern themselves on the particular point now before us? They have divine authority for the infliction, and also for the disuse of capital punishment. They are to look to the state of society, and annex this penalty to their laws or not, as the state of that society may require. This view of the subject settles, in our apprehension, the question of *right*. Whatever may be said of the expediency of capital punishment, we think that the question of right is settled; that it can be demonstrated both by the scriptures and the nature of the case.

This brings us back to the true point at issue, viz.: *Is it expedient to abolish capital punishment?* And here your Committee would remark that they have no undue attachment to antiquity. They would not continue any law upon the statute book, simply because it has been there for ages. But at the same time, when any usage has come down from our forefathers, sanctioned by the experience of ages, it is entitled to our respect; not simply because it is ancient, but because its propriety and utility have commended it to the good sense of the community at different periods, and under different circumstances. All this is true of capital punishment. In all ages of the world, in all climes, and among all nations, whether civilized or savage, this practice has prevailed. The common sense of all nations, and the experience of all ages have given their sanction to this mode of punishment. Men may speculate upon this or any other subject, but as practical legislators, we think it unsafe to substitute speculation for experience. Our speculations upon abstract questions are frequently deceptive. And in nothing do men more frequently err than in their speculations upon the influence of a statute. Because a law does not prevent all the crimes of the class specified,

some ignorantly suppose that it exerts no good influence. But the fact is, the benefits of a law are not visible to a superficial observer. Laws act unseen, and by restraining the passions, frequently suppress iniquity in the bud, and thus prevent its breaking out into overt acts. Apply this plain principle to the penalty of death.—It is not the infliction of the penalty—it is not an execution alone, that restrains the vicious. The fact that such a law exists, is known to the whole community, and exerts a restraining influence upon all classes. Though executions are "few, and far between," we believe that the law containing this fearful penalty, exerts a salutary influence, and prevents, not only capital, but many other crimes.

Those who advocate the abolition of capital punishment propose to substitute perpetual imprisonment for the penalty of death; and they maintain that such imprisonment is more to be dreaded than death itself. Nothing, say they, will exert so great an influence, because nothing will excite so much fear as perpetual confinement. Seclude men from society—put them into close confinement—shut them out from the converse of men, and you inflict upon them a punishment more severe than death itself. Such is the ground taken by many who oppose capital punishment; and they are compelled to take this ground in order to show that the punishment of death excites less dread, and, consequently, imposes less restraint than perpetual imprisonment.

It will be seen at once, by this statement of the argument, that the abettors of perpetual imprisonment allow that that penalty which excites the most fear, will exert the most salutary influence. On this position they entrench themselves, and on this ground we are willing to meet them. But it must be obvious at first view,

that the opposers of capital punishment, by occupying this ground, yield one of their favorite positions. They profess to be advocates for mercy; they are loud in their declarations that humanity calls upon us to strike from our statute book this relic of barbarity. But we would gladly inquire on which side the barbarity lies. No principle is better established than that such an imprisonment would shorten human life. No human being, secluded from society and immured in a dungeon, could survive for a long period of time. Those who plead for perpetual imprisonment of this kind, plead for the punishment of death. Not for death on the scaffold, but for death in a dungeon;—not for death inflicted at once, and in a manner as mild and merciful as the nature of the case will allow, but for death inflicted in a gradual manner, with inquisitorial delay, so that misery may wring every fibre than can feel, before the wretched victim is permitted to expire. And will men of reflection put forth such a system, and still labor to monopolise the appellation of philanthropists? Will they contend for such a lingering death, such an inquisitorial barbarity, and still tell us in the same breath, that they are in advance of the age in benevolence and humanity?

We are aware that some advocates for perpetual imprisonment would not go this length. They would have the murderer committed to prison, but would place him in the same comfortable situation that other convicts enjoy. This kind of imprisonment obviates the charge of inhumanity, to which close confinement is subject; but this involves the advocates of this comfortable imprisonment in another difficulty equally great. By making the situation of the prisoner comfortable, you destroy the motive of fear which is to restrain the villain; and hence must

allow that it exerts less influence than the punishment of death. Let us compare such a punishment with the punishment of death. Which will exert the greatest influence, death or perpetual imprisonment? The experience of the world concurs with divine authority, in pronouncing death "the king of terrors." But imprisonment for life does not cut off all hope. Let that be the penalty for murder and such like crimes, and the villain will calculate upon the chances of avoiding the penalty. In the first place he will calculate upon the prospect of pardon, then the chances of escape; and these will serve to weaken the influence of such a penalty, and take off the restraint.

We believe that nothing will exert so great an influence upon the great mass of the people, as the penalty of death. It will exert an influence upon some hardened wretches, who are proof against every thing else. The great poet, who was second to no man in his acquaintance with human nature, and in his knowledge of the springs of action in the human breast, has justly said that men would not

> "Groan and sweat under a weary life,
> But that the dread of something after death,
> ———puzzles the will,
> And makes us rather bear the ills we have,
> Than fly to others that we know not of."

The late execution of Russell and Crockett, in this city, for arson, proves most clearly that death strikes a terror upon the most hardened and desperate. Before those executions, the city was alarmed almost nightly by the fires kindled by the torch of the incendiary. But when these desperate fellows were called to atone for their wickedness upon the gallows, the torch of the incendiary was quenched, and the city had rest. This is a practical illustration of the influence of capital punishment, and weighs

more in the estimation of your Committee, than all the dreams of the closet which the present age has produced.

Wishing to do full justice to those who differ from us in opinion, we will notice several objections which they urge against the punishment of death. They tell us at one time, that men may be unjustly condemned, and if they are executed, no reparation can be made, even though their innocence should afterwards be discovered. Though this objection may appear plausible, we think it entitled to but little weight. In this enlightened age and country, where the law of evidence is so well understood, and where justice itself almost calls upon mercy to preserve the victim, it is hardly possible that any person can be unjustly condemned. And if a case should occur, where reasonable doubts could exist, the executive would come in with a commutation of the punishment, or with an entire pardon.

Those who urge this objection can have but little confidence in it, for they tell us in the next breath, that the penalty of death is thought to be so severe that jurors will not convict, even though the evidence should be clear. We have been told that "witnesses, jurors, and even judges," will sometimes violate their oaths, rather than expose a fellow being to this awful punishment. We believe this to be a gross libel upon our courts of justice. Those who are the most conversant with our courts, and who have witnessed capital trials the most frequently, and who are at the same time the most competent judges, assure us that the result of these trials is almost always correct. It is an established principle in criminal jurisprudence, that all doubts are to operate in favor of the accused. This is not peculiar in capital trials. Jurors are in all criminal cases to require clear and substantial

evidence, and if they can reconcile the facts in the case with the innocence of the prisoner, they are charged to do it. Let the penalty for murder be perpetual imprisonment, and the jurors would let their doubts operate strongly in favor of the prisoner. The advocates for perpetual imprisonment contend that that penalty would strike more terror than death; and if this position of theirs be true, then jurors would be more likely to acquit, if our law was so changed as to substitute perpetual imprisonment for death. The advocates for perpetual imprisonment will here find themselves in this dilemma. They must allow that capital punishment is more severe than imprisonment for life, or that it is not. If it be a severer punishment, it will exert more influence in restraining vice, and if it be less, then there would be greater difficulty in obtaining a conviction, if the penalty be perpetual imprisonment. This must follow inevitably, according to the reasoning of those we oppose.

Your Committee allow that the punishment of death is a dreadful penalty. They allow that existence is a sacred trust, and that every individual and every community is under the most solemn obligation to preserve life. There should be as there is, a tenderness in the community in reference to taking life. But who is entitled to this sympathy? The hardened murderer, or the innocent murdered? the ruined female, or her brutal ravisher? It is a morbid sensibility that would enlist all our generous feelings on the side of the villain,—that would forget the innocent, and "desire a murderer to be granted unto us."

Your Committee have examined the whole list of crimes which our laws have made capital, for the express purpose of determining whether some modification cannot safely be made in the law, whereby only the principals,

or the guilty in the first degree may suffer capitally. But after all the examination we have been able to make, we have not succeeded in making a distinction such as would satisfy our own minds, and authorize a change in the law. So far as principal and accessory are concerned, cases frequently occur in which the accessory before the fact is the instigator, the moving cause of the whole wicked transaction; and consequently more criminal than the principal, as the law would designate him who was in fact the mere agent in this deed of wickedness. Cases may also occur in which an accessory after the fact may exhibit as much malignity as the principal himself; but as cases of this character are rare, the law has wisely exempted the accessory after the fact from the penalty to which the principal is exposed. When the Committee shall have remarked upon the crimes now made capital, the board will be in possession of their views upon the provisions of the statutes in question.

In presenting the crimes which are now punished with death, the Committee will place at the head of the list, that of *murder*—a crime which is always considered one of the deepest dye. We think that all will allow that murder, defined and guarded as it is in law, is the greatest of crimes, and ought to be punished capitally, if that punishment is ever inflicted. Murder is not simply taking life. It is taking life with premeditation—with malice aforethought. When life is taken in self-defence, or from the impulse of sudden passion, the law has wisely provided that the penalty shall not be death. We believe that there is in fact but little doubt upon the expediency of punishing murder with death. Most of those who plead for a change of our law on this subject, allow that it may be expedient to punish this crime capitally.

Treason is the next crime we will present, that is punished capitally. All nations have agreed that treason is one of the most heinous offences. The great objections which have been made against punishing treason with death, are superseded by the express provisions of our constitution. Here we allow of no *constructive* treason; nothing can constitute that crime but "levying war against the State, or adhering to the enemies thereof, giving them aid and comfort." Nor can any person be convicted of that crime, "but by the testimony of *two* lawful witnesses to the same overt act of treason." Thus defined and guarded, the objections which lie against transatlantic treason, cannot apply here. As to the enormity of the crime—it may be one of the greatest magnitude. If the man who takes the life of a single individual is worthy of death, what shall be thought of the wretch who wages war against the Commonwealth, and involves thousands of innocent citizens in certain destruction?

Rape is another crime now punishable with death in this Commonwealth. This offence, whether we view it with reference to the injury done to the innocent victim, or the injury done to the community; or with reference to the depravity of the offender, or the facility with which the crime may be committed, should be regarded as one of no ordinary magnitude, and should be punished with the most exemplary punishment. We can conceive of no state of society more deplorable or wretched, than one in which our wives, sisters or daughters are exposed to the ruffian assaults of a brutal ravisher, whenever they are left unprotected. The murderer may have provocation to plead, the robber may be urged on by pecuniary embarrassment; but the heartless ruffian who assaults an

innocent and defenceless female, and inflicts upon her an injury worse than death, has nothing to plead in extenuation. There is nothing more corrupting in its influence upon the whole community, than incontinency, and any crime which exerts such a deleterious influence, should meet the sternest rebuke of an injured community. The crime of rape inflicts the deepest injury upon the innocent victim, and spreads more terror and alarm through the community, and disturbs the peace and security of society more than the crime of murder itself. Entertaining these views, your Committee believe that it would be unsafe to change the penalty in relation to this detestable crime.

Robbery, is another crime punished with death. That crime is thus defined by the statute. "If any person shall assault another, and shall feloniously rob, steal, and take from his person any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, with intent, if resisted, to kill or maim the person robbed; or if, being so armed, he shall wound or strike the person robbed, he shall suffer the punishment of death for the same."

By these provisions of law, it will be seen that simple robbery is not made capital. The robber must be *armed with a dangerous weapon, with an intent, if resisted, to kill or maim the person robbed*, before the crime can be made capital. Robbery, thus defined, is nearly synonymous with murder. The wretch who arms himself with the implements of death, and sallies forth under the cover of night, with an intent, if the occasion should require, to destroy the first traveller that shall fall in his way, is as guilty of the crime of murder as though he went out to destroy the life of a single known individual, from whom, perhaps, he had received some injury or in-

sult. It seems morally certain, that if the murderer is deserving of death, the highway robber can merit no less. The murderer may have provocation to plead, but the highway robber has not even that miserable plea. He premeditates his deeds of iniquity in cold blood, and wages a war of extermination against the first traveller he may meet. It may perhaps be said that the robber has no malice against his victim, like the murderer. Let us look at this subject for a moment. The murderer premeditates the destruction of a known individual; but the robber is so intent upon his prey, that he will assault the first person, whether he be friend or foe, that may fall in his way; and if the occasion should require, he will drive his dagger to the heart of his victim. Under these circumstances, we are not able to make any substantial distinction between the murderer and the man who robs with a deadly weapon, with an intent to murder, if the case should require it.

Arson is another crime which is punishable with death. The statute provision on this subject is as follows: "Every person who shall wilfully and maliciously burn in the night time, the dwelling of another, or shall in the night time, wilfully and maliciously set fire to any other building, owned by himself or another, by the burning whereof, such dwelling-house shall be burnt in the night time, shall suffer the punishment of death; but if the defendant shall prove on the trial, and the jury shall find that at the time of committing the offence, there was no person lawfully in the dwelling-house so burnt, the punishment, instead of death, shall be imprisonment in the state prison for life."

By these provisions, it will be seen that arson, to be capital, must be committed in the *night time;* it must be

committed upon a *dwelling-house*—a house that has inhabitants in it at the *time it is burnt*, whose lives would probably be destroyed by said burning. This crime, like robbery, has in it the essence of murder, and the man who commits it, is in a manner guilty of destroying human life; he is guilty, not of murdering a single individual, but of murdering hundreds. And shall the man who goes forth boldly and destroys a single individual, be punished with death, while the wretch who creeps forth cowardly under the cover of night, and puts in jeopardy the lives of hundreds, be exempted from this penalty? Shall the wholesale murderer be allowed to escape a doom which falls upon the man who destroys the life of a single individual? There is another reason why this crime should be visited with a severe punishment. It is more easily committed than almost any other, and the chances of escape are much greater. With matches of modern invention, this crime may be committed almost with impunity. Every wise government will apportion the penalties of the law not only to the enormity of the crime, but also to the prospect of escape. This shows the propriety of the punishment affixed to the crime of arson.

Burglary is the only remaining crime which is punished with death. The statute on this subject is as follows: "Every person who shall break and enter any dwelling-house in the night time, with intent to commit the crime of murder, rape, robbery, larceny, or any other felony, or, after having entered with such intent, shall break any such dwelling-house in the night time, any person being then lawfully therein, and the offender being armed with a dangerous weapon, at the time of such breaking or entry, or so arming himself in such house, or making an actual assault on any person being lawfully therein, shall

suffer the punishment of death." By this provision it will be seen that simply house breaking is not a capital offence. The house must be broken in the *night time;* it must be done for the purpose of committing the crime of *murder*, *rape*, or *other felony;* the house must have persons in it *at the time of breaking*, and the person breaking the house must *be armed with dangerous weapons*, or must make an *actual assault* upon some of the inmates of the dwelling. This crime, like that of robbery and arson, is nearly allied to the crime of murder. The law regards it as the same. If a person arms himself with the weapons of death, and breaks the castle of a citizen in the night time, with the intent to commit a felony, it seems perfectly evident that he will take life, if the occasion should require it; that is, if the master of the castle does what nature demands him to do, defend his castle and his family, he will destroy him. Your Committee are not able to see wherein the malignity of this crime falls materially short of that of murder.

Having passed the six capital crimes in review, your Committee now propose to notice some objections which are raised against the penalty of death as connected with some of them. It is said of robbery, arson and burglary, that they are only crimes against *property*, and so ought not to be punished with death. Your Committee deny that these are crimes against property merely. We have already shown, by the express words of the statute, that these crimes endanger human life, and that the perpetrator of them had the crime of murder reserved in his heart. These crimes, instead of being mainly or principally against property, are not made capital, except where it appears palpable that the destruction of human life was contemplated, and in fact designed, if the occasion should

require. It is a misrepresentation, then, to say that these are nothing but crimes against property.

Another objection made against capital punishment for these crimes is, that it encourages the taking of life. This objection is more plausible than any one which is urged against the present provision of our statutes. We have no object but that of truth. We will therefore state the objection in all its strength, and offer such considerations in reply, as are satisfactory to our own minds. The argument we would examine is this: It is said that the robber is in pursuit of plunder only, and that he is induced to take life, simply for the purpose of preventing the person robbed from appearing as a witness against him. We are told that the robber will reason in this way;—I have committed robbery,—my life is already forfeited; the punishment will be no greater if I should destroy the person robbed; if I spare him, he may appear a witness against me, and if I destroy him, my chances of escape are greater,—and if I should be detected, my punishment would be the same, whether I destroyed his life or simply robbed him of his property. From this reasoning it is inferred, that if robbery and burglary were punished by perpetual imprisonment only, there would be less inducement to take life; and hence many murders would be prevented.

We have already said that this is one of the most plausible arguments, which have been urged against capital punishment. But after all we believe it is not sound. On what principle is this reasoning founded? Clearly on the principle that perpetual imprisonment is a less punishment than death. It is said, that if robbery were punished by imprisonment for life only, there would be less inducement to take life. It will be seen at once, that

this argument cannot be employed by those who would abolish capital punishment in all cases; because, if robbery were to be punished by imprisonment for life, and murder were punished in the same manner, there would be precisely the same inducement to take life, that there is at present. None can employ this argument consistently, but those who would punish murder capitally; for those we oppose do not propose to punish robbery with any thing less than imprisonment for life.

Let us, then, examine the argument on that ground. It admits in advance, that the punishment of death would exert more restraint upon the villain than imprisonment for life. It is based solely on the principle, that the robber would stop short with the commission of the lesser crime, if he could thereby escape the greater punishment. This, we say, is a confession that the punishment of death will exert a greater influence, will excite more fear and produce more restraint than imprisonment for life. When the advocates for the abolition of capital punishment in certain cases, allow as they do by their argument, that capital punishment will exert more restraint than imprisonment, we wish to ask them whether the restraint put upon the crimes of rape, robbery, and burglary, is at present too great? Do they wish to expose our females to ruin, and our property and lives to destruction more than they now are? We cannot for a moment believe it, and we think on reflection they will see that the argument they employ involves principles at which they themselves would revolt.

But on this subject we wish to observe, that all good governments will use every reasonable exertion to protect the property and lives of their subjects. This must be done by inflicting a suitable punishment upon the offender, as a just desert upon him, and a warning to others. Every

good government will impose these restraints upon the villain, and erect these bulwarks to guard the rights of the virtuous and peaceable citizen. The only questions to be raised are these two, viz: 1. *What penalty should be affixed to the crimes before us?* 2. *Where shall this penalty, this barrier be placed?* These questions cover the whole ground, and when we shall have examined them, we will leave this branch of the subject.

1. *What penalty should be affixed to the crimes now under consideration?* We have already shown by the express language of the statutes that arson, robbery, and burglary, are a species of murder, involving not only the destruction of property, but of life. Those with whom we now contend (that is, those who admit that life should be taken for life—the only persons who can consistently urge this objection,) must see that these crimes defined and qualified as they are, are nearly allied to murder, and merit the same penalty. We will, then, leave this part of the subject, and proceed to the other inquiry.

2. *Where shall the barrier be placed?* Let us select one crime as a specimen; and the remarks, which we propose to offer upon this crime, will apply with but little variation to the others. Take the crime of burglary. The law of all civilized nations has made a man's house his *castle*. Here he may dwell in safety; here his wife and children may repose with the fullest assurance that they are secure from all brutal attacks. And does any man wish to see this safety impaired? We say they do not. The law should protect every man, in every place; but especially should it protect him with his family in his own dwelling, in the night time. Government is bound by the most sacred considerations, to throw its protecting ægis around the dwellings of its citizens. But where shall it be placed? at the outer gate of the castle? or at

the bed-side of the sleeping inmates? It would seem that there could be no doubt on this subject. The sentinel should be placed at the threshold. Here he can protect the defenceless family more effectually than at any other position. He can more easily withstand the ruthless invader at this Thermopylæ than on the extended plain. The penalty in this case must be placed either on the act of taking life, or on the act of arming with deadly implements and breaking the house, when the inmates are asleep. Our law has selected the latter, as the proper place for the penalty. And is not this wise? We think it is. The experience of the world teaches us, that temptations at a distance exert less power upon an individual, than temptations near at hand.

The individual who has armed himself, and who has advanced near the dwelling of a peaceable sleeping family, is supposed to have a less temptation to take life, than he would have after he has entered the dwelling, and loaded himself with spoils. The penalty placed at the threshold will much more effectually prevent the crime of murder, than though it were placed upon the actual deed of blood. Who then can complain that the penalty is placed at the door of the citizen? Placed here, it more effectually guards the sleeping citizen, than though it were placed on the very deed of death. So far as the protection of the citizen is concerned, our law is better, far better as it is, than it would be, if it were altered as is proposed. Who then is injured by our present law? Not the peaceable and virtuous citizen, he is protected by it. None can be injured but the vicious, if any injury is done at all. But we maintain that the vicious are not injured. The penalty placed where it is, will prevent the crimes of burglary and murder; it will save

the ruffian from his deed of darkness. In this manner, the whole community are benefited; the innocent are secured from destruction, and the vicious from crime. To your Committee it seems perfectly obvious, that the penalty is wisely placed; it prevents crime, it checks iniquity before it has perfected its darkest deed, and thus saves the lives of the innocent; and by preventing the crime, it saves t e ruffian from an untimely end. And the remarks made upon burglary will apply with a slight variation to rape and robbery. In each of these cases, we believe that the guard is rightfully placed in our statutes. Before the house is broken or the traveller attacked, the villain is cool, and will be likely in some degree to consider the consequences of detection, and so refrain from the crime. But after he has broken the dwelling or attacked the traveller, he becomes desperate, circumstances hurry him on, and acting from impulse, he will hardly consider the nature of the penalty, and hence will not be restrained by it.

Your Committee are satisfied that public sentiment is against any change in the law on this subject. We have on our statute book several crimes that are punished by perpetual imprisonment, and every man we think, must see that these crimes are less heinous than those which are now made capital. Forging notes of the state treasury, forging bills of any bank of the state, or having in his possession ten or more counterfeit bank notes, knowing them to be such, with intent to pass them;—these are crimes that may be punished by imprisonment in the state prison for life. Your Committee believe that the public are satisfied with these penalties, that they are regarded as wise and salutary. Now will any man presume to say that the crime of murder, or of rape merits no

more punishment than the crime of having in possession ten counterfeit bank bills? The crimes mentioned above are simply crimes against property, and yet they are punished with perpetual imprisonment; and if this punishment be just, and no more than the crimes merit, then the same penalty would be improper and disproportionate with reference to the greater crimes of murder, rape, &c.

Those who advocate the abolition of capital punishment frequently institute a comparison between states or countries where the laws happen to differ on the subject of capital punishment. "In New Hampshire, where they punish only murder and treason with death, the proportion of convicts to the state prison to the population, is only 1 in 12,208, while in Massachusetts, with six capital crimes, it is 1 to 7,016. In Tuscany, while there were no capital punishments, there were but four murders in twenty-five years, while in Rome there were twelve times that number in a single year, death being the penalty."

Nothing, in the estimation of your Committee, can be more delusive than such comparisons. There may be a thousand causes operating in one community to produce crimes, that do not exist in another. New Hampshire and Massachusetts are compared. But every man of common discernment must perceive at once, that the comparison is unjust. The extended seaboard of our own State exposes us to an influx of the dregs of Europe; our pauper laws, our public works, our more dense population—all combine to collect within our borders a greater proportion of those vile wretches, who prey upon the public, than would congregate in New Hampshire, with her limited seaboard, repulsive pauper laws, and sparse population. Rome is compared with Tuscany,—but we

would simply remark, that we have not a particle of evidence that all other things were equal in these places.

Let us look for a moment at these comparisons. What argument can be drawn from them? It is plain that all other things must be equal. Every temptation to sin—every cause of crime—every facility to iniquity—every consideration except that of the law, must be the same in two states or countries, before any comparison can justly be made between them. When every thing else is justly and exactly balanced, then the penalty of the law may be taken into the account. Do the advocates for the abolition of capital punishment show us that all other things are equal, and exactly balance each other? They do not; and hence their comparison can have no weight with any sound mind. But suppose that all other things are equal in the cases referred to above, to what does the argument amount? Simply to this—that in Rome people committed capital offences for the sole purpose of being executed! and that in Massachusetts offences are committed, solely because the offenders wish to be confined in the State prison. This is the legitimate result of that logic, and we will leave it with those who employ it, to reconcile it with common sense and common observation.

There is one argument in favor of capital punishment, which appears to your Committee to be a sound one. Men confined in prison naturally become desperate. Let their imprisonment be for life, and this would increase their desperation. It is difficult even now, to restrain our convicts in the State prison. But add to their number those that are now executed, and you not only increase the number, but you increase it by adding thereto some of the most hardened and daring wretches in the

whole community; and this, their natural daring would be increased by the fact, that they must spend their days in prison. Under these circumstances what is there to restrain them, if capital punishment be abolished? Now the prisoners are kept in awe by the penalty of death, which they know would be executed upon them, if they should rise, and kill their keepers. But if this restraint should be taken off, and men more numerous and more desperate should be put into our State prison, we fear that rebellion and massacre would be the result. Those committed for life would say,—our case is now hopeless; we must remain here during our natural lives. If we submit we must spend our days in confinement; but if we rise and destroy our keepers, we stand some chance for escape. At any rate we have nothing to lose. Our lives cannot be taken, nor the duration of our confinement increased. Thus reasoning like Milton's fallen spirits, they would be moved to acts of desperation, and the lives of their keepers would be put in jeopardy.

Should it be said that this consequence could be avoided by continuing the punishment of death in this particular case, we reply, that this is yielding the very principle for which the advocates for the abolition of capital punishment contend. And besides, on their own doctrine, this would endanger the lives of their keepers still more. They tell us that perpetual imprisonment is more dreaded than death itself. This is a fundamental principle of their system, and if it be true, then those confined for life would rise and destroy their keepers, for the sole purpose of having their own lives taken.

Your Committee are not aware that the public call for any change in this part of our criminal code. They know that great efforts have been made by some individuals to

call public attention to this subject. Circulars have been sent out for petitioners to the Legislature, for the abolition of capital punishment. One sect of Christians, which has been loud in its condemnation of every thing which looked like an interference, on the part of ecclesiastical bodies, with the affairs of State, has in its associations passed resolutions upon the subject, calling upon its friends to labor industriously to effect this change in our laws. But after all these exertions, the public mind has remained quiet. We have heard of no petitions, except those got up by a few active individuals. This shows most conclusively, that the public desire no change upon this subject. Your Committee will state another fact, which is deserving of great consideration, viz. that a great majority of those gentlemen who are the most conversant with law and with our courts of justice, are fully satisfied that a change would be inexpedient and dangerous.

There has been no full experiment had upon the abolition of capital punishment. It has been tried in our own State, on a small scale, and the experiment has failed. The crime of robbery, which before had been capital, was by the statute of 1804, made punishable with imprisonment for life. But in 1818 it was found that this species of crime had so multiplied, that the Legislature of that year felt constrained to change the penalty, and substitute the original penalty of death. This fact speaks volumes upon this subject.

Your Committee are sensible that they have extended their remarks to a great length, but their apology will be found in the importance of the subject committed to them. They have satisfied their own minds, that it is not expedient to change this part of our criminal code. The experience of the past gives them no assurance

that the change could be safely made. They see nothing in the present state of society which seems to warrant it. While Europe is emptying her poor-houses upon our shores, and her fugitives from justice are arriving here by hundreds, it would be unwise in us to relax our laws. The restlessness and disorder, the mobs and riots, which have been witnessed within a few years, admonish us not to remove those barriers against crime, which have been found necessary in more favored periods of our history. Your Committee, therefore, feel constrained, by their regard for the peace and well being of the community, and the security and happiness of its members,—by a sense of justice, and of humanity,—and by a solemn regard to their own responsibility, to report *that it is inexpedient to legislate upon this subject.*

By order of the Committee.

CHARLES HUDSON, *Chairman.*

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